Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1996

DANIEL REYNOLDS, Warden, JIMMY CHANDLER, W. WARD, FRANK MORGAN,

Petitioners,

v.

DAVID L. BROWN, JR.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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May, 1997

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21 pp

QUESTIONS PRESENTED

1. Where, for the purpose of summary judgment, the defendants do not contest the prisoner's version of the facts alleging Eighth Amendment violations, and the district court generally finds a "question of fact"; does *Johnson v. Jones*, 515 U.S. ___, 132 L.Ed.2d 238 (1995) preclude the court of appeals from jurisdiction to entertain an interlocutory appeal from the denial of summary judgment based upon qualified immunity in light of *Behrens v. Pelletier*, 516 U.S. ___, 133 L.Ed.2d 773 (1996)?

2. Is it possible for a public official to be "immune from suit" when the plaintiff alleges Eighth Amendment cruel and unusual punishment?

LIST OF PARTIES

The parties to this proceeding on *Petition for Writ of Certiorari* are:

Petitioners:

Dan Reynolds, Jimmy Chandler, W. Ward and Frank Morgan

Defendants in the District Court and Appellants in the United States Court of Appeals for the Tenth Circuit

Respondent:

David L. Brown, Jr.

Plaintiff in the District Court and Appellee in the United States Court of Appeals for the Tenth Circuit

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PETITION FOR WRIT OF CERTIORARI

Daniel Reynolds, Jimmy Chandler, W. Ward and Frank Morgan respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINION BELOW

The United States District Court for the Eastern District of Oklahoma, the Honorable Frank Seay, denied the Defendants' Motion for Summary Judgment. The Defendants appealed and the United States Court of Appeals for the Tenth Circuit dismissed the appeal on the basis that it lacked jurisdiction for this interlocutory appeal from the denial of qualified immunity. The opinions of the court of appeals and the district court are unreported.

STATEMENT OF JUDGMENT

The United States Court of Appeals for the Tenth Circuit dismissed this appeal for lack of jurisdiction over the interlocutory appeal from the denial of qualified immunity on February 21, 1997.

Petitioners invoke this Court's jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS

United States Code, Title 42:
§ 1983. Civil Action for deprivation of rights.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person w' hin the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia. (R.S. § 1979; Pub. L. 96-170, § 1, Dec. 29, 1979, 93 Stat. 1284.)

Amendment VIII Constitution of the United States:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

STATEMENT OF THE CASE

1. At the time this action arose, the Plaintiff was incarcerated in the Oklahoma Department of Corrections.

2. He brought this action seeking relief in the form of damages pursuant to 42 U.S.C. § 1983 for alleged violations of his rights pursuant to the Eighth Amendment to the United States Constitution.

3. The gravamen of the Plaintiff's Complaint is that the application of the "wristlocks" *per se* is cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution.

4. The Defendants filed a Motion for Summary Judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. For the purposes of the Motion, the Defendants did not challenge the Plaintiff's version of the facts. In the Motion, the Defendants asserted immunity from suit since, given the undisputed facts, their behavior was "objectively legally reasonable" in that they did not violate any "clearly established law" and, therefore, they were entitled to dismissal on the basis of qualified immunity.

5. The district court, without opinion, denied the Defendants' Motion for Summary Judgment. Upon ruling on the Defendants' Motion to Stay Pending Appeal, the district court noted that summary judgment was not proper "because defendants' claim of qualified immunity was 'inextricably bound to disputed factual issues.' *Guffey v. Wyatt*, 18 F.3d 869, 873 (10th Cir. 1994)." (District Court slip op. at 2, September 20, 1996).

6. The Court of Appeals for the Tenth Circuit declined to accept jurisdiction of the interlocutory appeal. It characterized the defendants' argument that their behavior was "objectively legally reasonable" merely as an "attempt to recast what is essentially a factual question as a legal one to avoid the consequences of *Johnson v. Jones.*" (Court of Appeals slip op. at 3).

7. The incidents giving rise to Plaintiff's claim for relief occurred while the Plaintiff was assigned to the Talawanda Heights Minimum Unit (THMU), a minimum security unit located outside the walls at the Oklahoma State Penitentiary (OSP). (Amended Complaint at 2).

8. The Plaintiff was received into the Oklahoma Department of Corrections on April 9, 1993 and transferred to the THMU on May 4, 1993.

9. On June 4, 1993, at approximately 6:45 a.m., a verbal altercation occurred between the Plaintiff and another inmate. (Plaintiff deposition at page 5, line 15, through page 6, line 19).

10. The Plaintiff refused to obey a direct order to walk to the disciplinary unit (E-Block) inside OSP. Defendant Correctional Officers Ward and Chandler then placed restraints in the form of metal handcuffs on the Plaintiff, with his hands placed in front of him. (Plaintiff deposition at page 12, line 13, through page 14, line 18; and page 19, line 7, through page 19, line 15; and page 23, line 23, through page 24, line 9.)

11. Officers Ward and Chandler then located themselves on either side of the Plaintiff and applied "wrist locks" to the Plaintiff. (Plaintiff deposition at page 13, line 7, through page 14, line 1).

12. "Wrist locks" in this instance consisted of the officers twisting Plaintiff's hands and wrist while he was in handcuffs. (Plaintiff deposition at page 13, line 2, through page 14, line 16).

13. All of the pain experienced by the Plaintiff was localized in his wrist and arms. (Plaintiff deposition at page 14, line 21, through page 14, line 24).

14. The wrist locks were applied throughout the entire trip by foot to the E-Block, which lasted approximately 3 to 5 minutes. (Plaintiff deposition at page 16, line 8, through page 16, line 14).

15. After being placed in a cell in the E-Block, the handcuffs were removed. The Plaintiff did not have any

bleeding, abrasions or cuts. (Plaintiff deposition at page 20, line 6, through page 20, line 18).

16. Approximately thirty minutes after arrival at E-Block, the medical unit examined the Plaintiff. (Plaintiff deposition page 20, line 19, through page 20 line 22).

17. The Plaintiff did not experience any permanent injuries and had fully recovered within a few days. (Plaintiff deposition at page 22, line 25, through page 23, line 9).

18. There were no dealings between the Plaintiff and the Defendants prior to the incident which is the subject of this action. (Plaintiff deposition at page 5, line 20, through page 5, line 25).

19. The only indications that the Defendants intended to cause harm to the Plaintiff was the fact that they applied the wrist locks. (Plaintiff deposition at page 16, line 15, through page 18, line 15 and page 24, line 19, through page 26, line 17)

REASONS FOR GRANTING THE PETITION

The impact of the Tenth Circuit's refusal to hear the appeal is that there is no qualified immunity even when a public official does not contest the plaintiff's version of the facts. If a plaintiff alleges cruel and unusual punishment, public officials will now be required to incur the expense of preparation for trial and the burdens of trial before being able to advance the denial of qualified immunity where the plaintiff's version of the facts are not disputed and there is no clearly established law that the defendant has objectively violated.

The decision by the Tenth Circuit, that it did not have jurisdiction to consider the interlocutory appeal is in conflict with this Court's decision in *Behrens*.

CONCLUSION

This Court should grant certiorari to review the Tenth Circuit's decision that it lacked jurisdiction and upon review, remand with instructions to consider the appeal on the merits.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

DAVID L. BROWN, JR., Plaintiff-Appellee, v. DANIEL REYNOLDS, Warden, Oklahoma State Penitentiary; JIMMY CHANDLER, Guard, Oklahoma State Penitentiary; W. WARD, Guard, Oklahoma State Penitentiary; FRANK MORGAN, Captain of guards or correctional officers, Defendants-Appellants.	)	No. 96-7097 D.C. No. 93-CV-508-S

ORDER

Filed February 21, 1997

Before **ANDERSON, KELLY** and **HENRY,** Circuit Judges

This court lacks jurisdiction over this interlocutory appeal from the denial of qualified immunity. *See Behrens v. Pelletier,* 116 S.Ct. 834, 842 (1996); *Johnson v. Jones,* 115 S.Ct. 2151 (1995).

The plaintiff, a former prison inmate, filed a 42 U.S.C. § 1983 action alleging that: 1) he was subjected to cruel

and unusual punishment in violation of the Eighth Amendment by prison guards when they used wrist locks on him when he was transported to a disciplinary unit; 2) he was denied due process of law by being placed in restrictive housing during the investigation of charges; and 3) he was denied equal protection of the law. The district court granted the defendants' motion to dismiss.

On appeal, this court affirmed the dismissal of the due process and equal protection claims but reversed on the Eighth Amendment claim. The court stated that:

> Mr. Brown has recounted the facts surrounding his alleged injury from the "wristlock" procedure, as required of a pro se plaintiff. Based on the record before us, including the discrepancy regarding the administration of medical attention there exists at least the possibility that Mr. Brown can prove the facts in support of his claim. Additional facts are necessary to determine whether Mr. Brown was subjected to the "unnecessary and wanton infliction of pain."

Brown v. Reynolds, No. 94-7159 (10th Cir. Sept. 22, 1995) (internal citations omitted).

On remand, the defendants filed a motion for summary judgment. The motion was denied by minute order. The defendants filed this appeal.

The district court then stayed the action below pending this appeal. The court stated that it had concluded that there were genuine issues of material fact surrounding the reasonableness of the use of the wrist locks.

In *Johnson v. Jones*, the Supreme Court held that interlocutory jurisdiction does not lie to review a denial of

qualified immunity when the denial is based on the existence of a genuine issue of material fact. 115 S.Ct. at 2156, 2159. *See also Behrens v. Pelletier*, 116 S.Ct. at 842 ("*Johnson* held, simply, that determinations of evidentiary sufficiency at summary judgment are not immediately appealable merely because they happen to arise in a qualified-immunity case; if what is at issue in the sufficiency determination is nothing more than whether the evidence could support a finding that particular conduct occurred, the question decided is not truly "separable" from the plaintiffs claim, and hence there is no "final decision.") (internal citations omitted).

The defendants argue that the issue before this court is a legal one – that they are entitled to qualified immunity because the behavior complained of is "objectively legally reasonable." The defendants' argument is merely an attempt to recast what is essentially a factual question as a legal one to avoid the consequences of *Johnson v. Jones*.

APPEAL DISMISSED. The mandate shall issue forthwith.

Entered for the Court

PATRICK FISHER, Clerk of Court

by: /s/ Ellen Rich Reiter
Ellen Rich Reiter
Deputy Clerk/
Appeals Expediter

APPENDIX B

United States District Court
for the Eastern District of Oklahoma
August 19, 1996

Charles K. Babb, Esq.
Office of the Attorney General
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Suite 260
Oklahoma City, OK 73105-3498

CIVIL MINUTES

6:93-cv-00508 Brown v. Reynolds

DOCKET ENTRY

MINUTE ORDER: overruling defendants' motion for summary judgment [45-1] (FHS) (cc: all counsel)

WILLIAM B. GUTHRIE, Clerk

By: /s/ Susan Gilmartin
Deputy Clerk

THIS NOTICE SENT TO THE FOLLOWING COUNSEL:

David L. Brown Jr.
Charles K. Babb, Esq.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF OKLAHOMA

DAVID L. BROWN JR., #214025 Plaintiff.	)	
v.	)	**Case No. CIV-93-508-S**
DAN REYNOLDS, JIMMY CHANDLER, FRANK MORGAN AND WILLIAM WARD, Defendants.	)	

NOTICE OF APPEAL

Notice is hereby given that DAN REYNOLDS, JIMMY CHANDLER, FRANK MORGAN AND WILLIAM WARD, Defendants in the above named case, hereby appeal to the United States Court of Appeals for the Tenth Circuit from an order denying Defendants' Motion for Summary Judgment based upon Qualified Immunity entered in this action on the 19th day of August, 1996.

Respectfully submitted,

W.A. DREW EDMONDSON
ATTORNEY GENERAL OF OKLAHOMA

/s/ Charles K. Babb
CHARLES K. BABB,
OBA #10195
ASSISTANT GENERAL COUNSEL

DEPARTMENT OF CORRECTIONS
4545 N. Lincoln Blvd.,
Suite 260
Oklahoma City, OK 73105
(405) 521-4274

ATTORNEYS FOR DEFENDANTS

CERTIFICATE OF MAILING

This is to certify that on the 27th day of August, 1996, I mailed a true and correct copy of this instrument, postage prepaid, to:

David L. Brown, Jr.
711 N. 28th
Muskogee, Oklahoma 74401

/s/ Charles K. Babb
Charles K. Babb

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF OKLAHOMA

DAVID L. BROWN, JR., Plaintiff,	)	**No. CIV 93-508-S**
v.	)	(Filed
DAN REYNOLDS, et al., Defendants.	)	Sept. 20, 1996)

ORDER GRANTING STAY OF PROCEEDINGS PENDING APPEAL

Plaintiff David L. Brown, Jr. appealed this court's dismissal of his civil rights complaint filed under the authority of 42 U.S.C. § 1983. The United States Court of Appeals for the Tenth Circuit affirmed this court's decision as to Count II and Count III and reversed and remanded as to Count I of his amended complaint which concerned the "wristlock" procedure and administration of medical attention. *Brown v. Reynolds*, No. 94-7159 (10th Cir. Sept. 22, 1995).

Plaintiff, a former inmate at Oklahoma State Penitentiary in McAlester, Oklahoma ("OSP"), alleges he offered no resistance while being transferred in handcuffs to the disciplinary unit at OSP on June 4, 1993. However, Defendants Ward and Chandler maliciously twisted, squeezed and pulled his hands, wrists and fingers in a wristlock, causing intense and unnecessary pain with the intention of breaking his hands and wrists. Plaintiff claims he requested Ward and Chandler to stop applying the wristlock, but Defendant Morgan replied, "It's too late now, I

told you it was going to hurt." Plaintiff claims that Defendant Ward laughed and smiled while plaintiff screamed in pain from the wristlocks, indicating Ward's intent to cause harm to plaintiff. Chandler allegedly "acted with expressions of joy" in response to plaintiff's pain.

Plaintiff claims that after the incident he twice requested the facility nurse to provide medical treatment for his sore and swollen wrists. The nurse allegedly advised him there was no medication or treatment available, and he would have to endure the injury and resulting pain. He asserts he suffered three days of "excruciating discomfort."

Defendants assert there is no evidence the force was applied in a malicious or sadistic manner to cause harm as must be shown under *Hudson v. McMillian*, 503 U.S. 1, 6 (1992). Defendants alleged in their motion for summary judgment that the use of wristlocks was justified due to "Plaintiff's refusal to walk to the disciplinary unit after a disruption." Further, "the amount of force used was de minimis to the circumstances and was of short duration." By affidavit in the special report Defendant Ward stated he has no knowledge of the incident alleged by plaintiff in this lawsuit, and he "never twisted, squeezed, or pulled on the hands, wrists, and fingers of the Plaintiff while he was handcuffed, or at any other time." Ward's affidavit further stated that Defendant Chandler is no longer employed at OSP, but Ward never observed Chandler using excessive force while escorting an inmate. Defendants allege plaintiff was examined by the medical unit thirty minutes after the incident, and he suffered no "edema, reddness [sic], [ ] abrasions" or permanent injuries.

Based on the presence of genuine issues of material fact, summary judgment was not appropriate in this case. Fed. R. Civ. P. 56(c). *Celotex v. Catrett*, 477 U.S. 317, 323 (1986). Summary judgment on the ground of qualified immunity was, likewise, not proper, because defendants' claim of qualified immunity was "inextricably bound to disputed factual issues." *Guffey v. Wyatt*, 18 F.3d 869, 873 (10th Cir. 1994). Therefore, on August 19, 1996, the court overruled Defendants Ward and Chandler's motion for summary judgment.

This action is now before the court on Defendants' motion for stay of proceedings pending appeal. Plaintiff has not responded to the motion. "The entitlement [to qualified immunity] is an immunity from suit rather than a mere defense to liability; . . . it is effectively lost if a case is erroneously permitted to go to trial. *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985). The court, therefore, finds that the defendants should be allowed to complete their appeal on the issue of qualified immunity before proceeding with trial. *See Gallegos v. City and County of Denver*, 984 F.2d 358, 362 (10th Cir. 1993), *cert. denied*, 508 U.S. 972 (1993).

Accordingly, defendants' motion for stay of proceedings is granted until the Tenth Circuit Court of Appeals issues its decision on the question of defendants' asserted defense of qualified immunity.

IT IS SO ORDERED this 20th day of September, 1996.

/s/ Frank H. Seay
FRANK H. SEAY
UNITED STATES
DISTRICT JUDGE